U.S. Department of Commerce
National Oceanic and Atmospheric Administration

U.S. Environmental Protection Agency

Mr. Greg Aldrich, Acting Administrator
Water Quality Division
Department of Environmental Quality
811 SW 6th Avenue
Portland, OR 97204-1390

Dear Mr. Aldrich,

The Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Administration (NOAA) have enclosed our initial assessment of Oregon's Implementation Ready (IR) TMDL approach for the Mid-Coast sub-basin and its ability to achieve and maintain water quality standards and enable Oregon Department of Environmental Quality (ODEQ) to satisfy the condition on its Coastal Nonpoint Program for additional management measures for forestry. This letter responds to the Final Settlement Agreement for Northwest Environmental Advocates v. Locke, et. al, Civil No. 09-0017-PK. Specifically, EPA and NOAA agreed to provide the ODEQ with an initial written assessment by December 31, 2012 on:

- whether implementation of the Oregon Coastal TMDL approach (now referred to as the Implementation-Ready or IR-TMDL approach), including safe-harbor best management practices (BMPs), in the Mid-Coast sub-basins is likely to result in actions that will achieve and maintain water quality standards (WQS); and
- whether ODEQ's plan for developing and updating TMDLs for all sub-basins in the Coastal Nonpoint Pollution Control Program (or Coastal Nonpoint Program) management area using the Implementation-Ready TMDL approach could satisfy the outstanding forestry condition on the state's Coastal Nonpoint Program.

When EPA and NOAA negotiated this milestone in the settlement agreement, the agencies assumed that DEQ would have completed the Mid-Coast TMDLs by June 30, 2012 in accordance with DEQ's July 21, 2010 commitment letter. During 2012, DEQ notified EPA and NOAA that it expected the Mid-Coast TMDL to be completed by June 30, 2013. Therefore, in lieu of the TMDL, EPA and NOAA have considered many documents in making our assessmentincluding comments from the plaintiff (see enclosed list). ~~established~~ ~~would be met b.~~ ~~. In addition, ODEQ was to eitproviding~~ .

EPA and NOAA recognize the complexities of pursuing this new, innovative, IR-TMDL approach especially with the concurrent water quality standard litigation which is impacting temperature TMDL development in Oregon. Our agencies also recognize the extensive effort expended by ODEQ's staff and management to make this approach successful. Oregon has held numerous stakeholder advisory and technical workgroup meetings, analyzed and presented information to support the temperature, sediment and bacteria TMDLs, defined the geographic scope of these TMDLs, including Type N streams where appropriate and developed defensible sediment targets for 303(d) listings related to turbidity and biocriteria. These are all important

steps for laying the groundwork for the next critical and essential element to meeting the Settlement Agreement - to determine the management measures that are necessary to meet water quality targets for sediment and temperature.

Without a completed Mid-Coast TMDL that includes specific BMPs and a better understanding of how the TMDL process will address landslide prone and road issues, EPA and NOAA do not have sufficient information to conclude that the IR-TMDL approach would 1) enable Oregon to achieve and maintain water quality standards, and 2) satisfy the additional management measures for forestry conditions in its Coastal Nonpoint Program. Based on what we have been presented to date, we have concerns whether the current approach would enable the state to achieve either goal.

Even though there has been a great deal of effort in developing key components of the TMDL, the original deadlines have slipped significantly. More importantly, there has been limited progress on developing and identifying the best management practices which are key to meeting both water quality standards and the outstanding coastal nonpoint program conditions. In order to meet the Settlement Agreement conditions, it is important that the analyses and discussion with stakeholders on the management measures needed to meet water quality standards begin as soon as possible. Specifically, EPA and NOAA will need the following information to assess whether DEQ has taken sufficient actions to address the additional forestry management measures in the Coastal Nonpoint Program:

- Additional detail on the IR-TMDL process;
- Approach to address landslide prone areas and road density and maintenance;
- Examples of "safe harbor" BMPs Oregon would use to address
    - protection of riparian areas
    - protection of landslide-prone areas
    - management/maintenance of forestry roads; and

Load allocations and surrogate targetsThe enclosed assessment document provides additional information on what EPA and NOAA feel are positive aspects of the IR-TMDL process, current shortcomings, and what Oregon needs to do to satisfy its remaining additional management measures for forestry condition and achieve and maintain water quality standards. We have also included feedback on Oregon's approach for satisfying the other two conditions on its Coastal Nonpoint Program related to new development and onsite sewage disposal systems.

According to the settlement agreement, EPA and NOAA must announce in the Federal Register our intent to fully approve or disapprove Oregon's Coastal Nonpoint Program by November 15, 2013. As we have shared with Oregon in the past, we must receive all information from Oregon satisfying its three remaining conditions and update the rationales for conditions receiving interim approval by June 30, 2013, in order to meet this deadline. EPA and NOAA are very concerned that we will not be able to announce our intent to fully approve Oregon's program by November 15, 2013. If we must disapprove the state's program, the Coastal Zone Act Reauthorization Amendments requires NOAA and EPA to withhold 30 percent of Oregon's Coastal Zone Management Act Section 306 funding and Clean Water Act Section 319 program.

As EPA and NOAA do not want to see the state lose critical funding that supports waterquality and habitat protection, working with Oregon to achieve full approval of its Coastal Nonpoint Program continues to be a priority for NOAA and EPA. Both agencies will continue to work closely with DEQ to expeditiously move its IR-TMDL effort forward and to enable the state to meet the other remaining conditions on its Coastal Nonpoint Program.

Sincerely,

Margaret Davidson, Acting Director
Office of Ocean and Coastal Resource Management
National Oceanic and Atmospheric Administration

Daniel D. Opalski, Director
Office of Water and Watersheds
Environmental Protection Agency, Region 10

cc: Dick Pedersen, Director, ODEQ
Gene Foster, Watershed Management Manager, ODEQ
Patty Snow, Oregon Coastal Management Program Department of Land, Conservation and Development
Bill Blosser, Chair, EQC
Nina Bell, NWEA

EPA and NOAA's Assessment of Oregon's Implementation-Ready TMDL Approach and the State's Progress in Addressing the Remaining Conditions on its Coastal Nonpoint Pollution Control Program

1) ***Will the Implementation of the Implementation-Ready TMDL, in the Mid-Coast Sub-basins Likely Result in Actions to Achieve and Maintain Water Quality Standards (WQS)?***

DEQ has not yet begun to evaluate the management measures (MMs) needed to achieve and maintain water quality standards. Absent these MMs, EPA and NOAA do not believe the coastal TMDL approach is likely to result in actions that achieve and maintain WQS. DEQ has made good progress to establish the geographic scope of the sediment TMDL and the water quality targets for the TMDL to address turbidity and biocriteria listings. First, DEQ used PREDATOR and Stressor ID methodology to assess the biocriteria impairments caused by sediment to determine the scope of sediment problems in the Mid-Coast. Second, DEQ determined percent fine sediment targets associated with biological impairments to set sediment water quality targets for biocriteria listings. The determination of sediment water quality targets is an important step for establishing a benchmark to assess the effectiveness of management measures to improve water quality. EPA and NOAA believe the methodology that DEQ has set forth is credible and establishes an important link between the aquatic life use and water quality.

However, as previously stated, the management measures remain the most important part of meeting the conditions for approval of the CNPCP. regon Department of Environmental Quality (ODEQ) needs to develop mandatory and enforceable management measures (MMs) in the TMDLs that if implemented would result in meeting WQS. If ODEQ chooses to allow the Designated Management Agencies (DMAs) to develop the MMs, then ODEQ needs to determine whether the MMs submitted by the DMAs are adequate and require additional MMs if DMA actions alone are not adequate to meet WQS .

2) ***Will Oregon's Plan Developing Implementation-Ready TMDLs throughout the Coastal Nonpoint Program Management Area using Satisfy the Outstanding Additional Management Measure for Forestry Condition on the State's Coastal Nonpoint Program?***

Based on what EPA and NOAA have been presented to date, we do not believe the coastal TMDL approach is likely to satisfy outstanding forestry conditions. A conceptual road strategy that ODEQ has discussed with EPA has good but potential but to date ODEQ has not provided a road strategy with required elements or fleshed out specifics. Key elements of a viable road strategy that could address outstanding road concerns include a road inventory/assessment requirement to identify where road related impacts to water quality exist, establishment of a reasonable timeline for fixing these problems, and a requirement to track and report on progress made to fix identified road problems. Implementation principles for the road program would include addressing the worst road problems or highest risk

categories of road problems earlier in the overall timeline as well as "even flow" or milestone based targets to ensure steady progress on identified road work.

The required application of effective road siting, construction, operation and maintenance BMPs is another key element of a viable program. The BMPs should ensure road stability and drainage of road runoff back onto the forest floor. Periodic monitoring or inspections would insure the implementation and effectiveness of BMPs. Since avoiding the direct discharge of sediment laden road runoff into streams and other waterbodies should be a primary focus of a viable forest road program, targets for the maximum percentage of a road network allowed to discharge directly to streams and other waterbodies, or other similar targets, should be part of a viable roads program. Monitoring should be included to track progress towards meeting those targets. Road program requirements for vacating, abandoning, and closing roads, including storm proofing BMPS are key. A comprehensive roads program that requires the above elements has good potential to address legacy roads, cumulative impacts, and road density problems. The inclusion and specificity of the above elements will be considered in the NOAA/EPA determination of whether outstanding forestry conditions have been addressed.

EPA and NOAA are concerned about the lack of Oregon's progress on additional MM's for riparian and landslide prone area protection. Oregon Department of Forestry (ODF) is not considering requirements for protection of riparian areas around nonfish streams in their current riparian rulemaking effort. It is not clear that ODF will have developed requirements for protection of riparian areas around small and medium fish bearing streams via the rulemaking process within the timeline that EPA and NOAA must make a final decision on the adequacy of Oregon's CNPCP. DEQ has not developed additional management measures for small and medium fish bearing streams or nonfish streams in the IR-TMDL effort. There is a significant body of science supporting increased protection of riparian areas around small and medium streams in OR. Increased no cut buffers, higher tree retention targets, minimum canopy retention targets, and/or higher basal area targets are currently required on private forest lands, for similar forest types to Oregon's forest types, in the two adjacent coastal states.

Buffering of key segments of nonfish streams that effect downstream water quality, such as riparian areas above confluences of nonfish streams and fish streams; buffering of hollows, inner gorges, headwalls, unstable landforms, and stream initiation points; and buffering of special aquatic sites such as seeps, springs, wetlands and beaver ponds could help address sediment, large wood and stream temperature issues and additional MM's for riparian protection. NOAA and EPA strongly recommend consideration of riparian protection approaches similar to those that have addressed CNPCP requirements in Washington and Oregon.

Oregon has not provided information regarding additional management measures for landslide prone areas. ODF already has a required management measures for protection of landslide prone areas that pose a risk to humans. A similar approach could be applied on

high risk landslide prone areas to protection water quality and fisheries. Consider adopting requirements similar to those of Washington for protection of landslide prone areas.

A viable program for protection of landslide prone areas would include a process for identifying and designating high risk landslide prone areas. Factors such as slope and landform, sediment and wood delivery potential, and geologic factors could be used in the designation. Landscape scale tools such as LiDAR and DEMs could focus identification and designation efforts. An array of management measures, including no harvest and thinning at various levels could be required in high risk areas based on predetermined factors such as delivery potential, the sensitivity of the aquatic resources, existing instream conditions, or other parameters. An option to utilize a certified geologist or engineers to develop viable options to a predetermined set of management measures could be provided.

In order to satisfy outstanding forestry conditions for protection of riparian and landslide prone areas, Oregon would need to require additional riparian MMs for both small and medium streams, for nonfish streams and for landslide prone areas.

3) *Feedback on the State's Progress in Meeting the New Development Condition on its Coastal Nonpoint Program*

To address its remaining condition for new development, ODEQ has proposed to:

- develop guidance, consistence with the new development 6217 (g) management measure, for TMDL Implementation Plan Development for urban and rural residential areas within the coastal nonpoint program management area boundary; and
- provide a strategy and schedule for completing and updating TMDL Implementation Plans to be consistent with the new guidance.

In its July 2010 letter to EPA and NOAA, ODEQ committed to completing a final draft of the guidance by December 31, 2010, releasing the final guidance by June 30, 2011, and beginning to hold workshops for Designated Management Areas (DMAs) by June/July 2011. However, as of to date, ODEQ has yet to complete the guidance and the "final" draft EPA and NOAA reviewed in July 2012 still needed significant work.

While EPA and NOAA have been supportive of the potential of this approach for addressing the new development management measure requirements, we are very concerned that the deadlines have slipped significantly. In addition, based on EPA and NOAA's review of the July 2012 "final" draft, *Guidance for TMDL Implementation Plan Development for Urban/Rural Residential Land Uses within the Coastal Nonpoint Management Area*, it is still unclear if the TMDL Implementation Plans developed would include practices consistent with the 6217(g) management measure for new development and if DEQ has the authority to require implementation of the new development management measure, as needed (see comments EPA and NOAA provided to DEQ by email on July 23, 2012). This gives us concern that this TMDL Implementation Plan Guidance for urban areas may not enable Oregon to satisfy its new development condition.

As ODEQ finalizes this guidance, it needs to make sure the guidance provides clear instruction to the DMAs that practices consistent with the new development management measure need to be incorporated into their Implementation Plans (i.e., practices that will reduce post-development total suspended solid (TSS) loadings by 80% or reduce TSS loadings so that the average annual TSS loads are no greater than predevelopment loadings, and maintain post-development peak runoff rate and average volume to pre-development levels). The guidance also needs to clearly indicate that DEQ can ensure implementation of the new development management measure, as needed.

It was EPA and NOAA's understanding that the Implementation Guidance would require Urban DMAs to include practices consistent with the new development measure within their TMDL Implementation Plans, or at a minimum, ODEQ would have the ability to require implementation of the recommended new development management measure. While states are able to use voluntary approaches backed by enforceable authorities to meet their Coastal Nonpoint Program requirements (see EPA and NOAA's 1998 *Final Administrative Changes Memo*) statements in the July final draft appear to contradict Oregon's September 23, 2005, legal opinion asserting that ODEQ does have authority to require implementation of the 6217(g) measures as necessary to control nonpoint source pollution.

EPA and NOAA hope ODEQ can expeditiously complete the *Guidance for TMDL Implementation Plan Development for Urban/Rural Residential Land Uses within the Coastal Nonpoint Management Area* and ensure that it clearly states that Urban DMAs need to include practices consistent with the new development measure and that ODEQ has the ability to ensure implementation of these practices, as needed. We strongly encourage DEQ to share a revised final draft of the guidance with EPA and NOAA for review so we can confirm that these requirements are met or provide recommendations for how the draft can be improved further.

4) Feedback on the Oregon's Progress in Meeting the Onsite Sewage Disposal System Condition on its Coastal Nonpoint Program

To address its remaining condition for OSDS, ODEQ has proposed to develop rules to require point of sale inspections for systems within the coastal nonpoint program boundary. EPA and NOAA applaud Oregon's progress on rule development and the fact that it was on target for meeting benchmarks in its July 2012 commitment letter. The proposed rules require all OSDS within the coastal nonpoint program management area to be inspected by a professional engineer, registered environmental health specialist or wastewater specialist or a certified inspector at the time of property transfer and that those inspections be reported to ODEQ. The state has also provided a sample inspection form that provides for a detailed examination of the system beyond a simple visual inspection. The proposed rules requiring point of sale inspections and reliance on qualified inspectors, combined with the state's detailed inspection form, will enable the state to satisfy its OSDS condition when adopted.

EPA and NOAA are aware that ODEQ has decided to delay presenting the rules to the EQC for adoption until March 2013 to give them more time to discuss the proposed rules with several state legislatures. We recognize some additional time may be needed to address potential concerns. However, we strongly hope that the adoption of the proposed rules will not be delayed beyond the March. In addition, ODEQ must ensure that significant changes to the rules do not occur so that the rules would no longer enable Oregon to satisfy its remaining OSDS condition.